

## CAREGIVER BACKGROUND CHECK PILOT QUESTIONS AND ANSWERS

### C. Background Check Process

- C1. Are pilot states required to check the state nurse aide registry for all prospective employees, including nurses, physical therapists and physicians?
- Yes, Section 307 of the MMA requires facilities or providers to, “check any available registries that would be likely to contain disqualifying information about a prospective employee of a long-term care facility or provider.”
- The state nurse aide registry must always be checked for all prospective nurse aide applicants, as a registry “likely to contain disqualifying information.” Pilot states may require a state nurse aide registry search for all direct patient access applicants. However, at a minimum, if there is evidence or reason to believe the nurse aide registry is likely to contain disqualifying information for any prospective employee who is not a nurse aide (e.g., licensed practical nurse, registered nurse, housekeeper, etc.), then the nurse aide registry must be checked.
- C2. Are pilot states required to check other state nurse aide registries?
- Yes, the facility or provider is required to, “check any available registries that would be likely to contain disqualifying information about a prospective employee.” If other state nurse aide registries are likely to contain information for the prospective employee, a check of those other registries must be completed.
- C3. How long does the nurse aide registry maintain the record of an aide who has a substantiated finding?
- Federal regulations require state nurse aide registries to permanently maintain the name of a nurse aide who has a substantiated finding of abuse, neglect or misappropriation of property. A limited exception exists for substantiated findings of neglect. State agencies must establish a process for a nurse aide to petition the state to remove his or her name from the nurse aide registry. The state may remove the aide’s name from the registry, if the state determined the employment and personal history of the aide does not reflect a pattern of abusive behavior or neglect, and the neglect involved in the original finding was a singular occurrence.
- C4. Why are we required to check the Wisconsin Nurse Aide Registry when that information is included in the DHFS Response to Caregiver Background Check letter (also referred to as the IBIS letter) we receive from the Caregiver name-based background check?
- Section 307(b)(2)(B)(1) of the MMA, Elimination of Unnecessary Checks, stipulates that participating states must establish a procedure that permits a long-term care facility or provider to terminate the background check at any stage at which disqualifying information regarding a prospective newly hired caregiver is obtained (e.g., nurse aide registries, OIG Exclusions List, other databases, state criminal history record, FBI IAFIS record).
- In order to comply with this requirement all covered providers must first search the free registries before the Caregiver name-base background check is run. Only free registries which apply to the new hire must be searched. See question C1.

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C5. What national databases could be searched under the background check pilot requirements? In addition, to the state nurse aide registry check, it may be appropriate to check other national databases. Other national databases include the Medicare Exclusion Database (MED), Fraud Investigation Database (FID), the National Practitioner Data Bank (NPDB) and the Healthcare Integrity and Protection Data Bank (HIPDB). It is anticipated that these databases will be checked in limited circumstances, as appropriate for each employee category. A brief description of each national database is provided below:

### *Medicare Exclusion Database (MED)*

The US Department of Health and Human Services, through its Office of Inspector General (OIG), has the authority to exclude certain individuals from participation in the Medicare and state health care programs. In order to assist contractors and states in determining that no excluded individual or entity receives Medicare or Medicaid payments, CMS created the Medicare Exclusion Database (MED). CMS matches this database against files of providers billing Medicare and Medicaid and against databases with employment information to ensure that excluded individuals and entities do not violate the terms of their exclusion. This is the principal mechanism used by states to check for excluded providers, and is also used by the Medicare affiliated contractors and Medicaid State agencies. This database only needs to be checked only for those newly hired caregivers who can bill Medicare or Medicaid for their services.

### *Fraud Investigation Database (FID)*

The Fraud Investigation Database (FID) captures information on Medicare fee-for-service fraud investigations and payment suspensions. Entries are made into the FID by Medicare fraud units. The system maintains records on both current and closed investigations and payment suspensions. This database would need to be checked only for those newly hired caregivers who can bill Medicare or Medicaid for their services. However, since Medicare exclusions are captured in the MED, it is very unlikely that it would be included as part of the background check process.

### *Healthcare Integrity and Protection Data Bank (HIPDB)*

The Healthcare Integrity & Protection Data Bank (HIPDB) is intended to provide a “one-stop-shop” database for public information on the imposition of health care sanctions. It contains final adverse action information, including: health care-related criminal convictions and civil judgments, government health care program exclusions (such as Medicare and Medicaid exclusions), adverse licensure or certification actions, and certain other public, adjudicated, negative actions and findings related to health care, by Federal or State agencies and by health plans. The information reported to the HIPDB pertains to individuals or entities that are health care providers, suppliers, or practitioners. HIPDB data is available to health plans, Federal and State licensing or certification agencies, the Department of Justice, HHS, certain other Federal agencies, State Medicaid Fraud Control Units (MFCUs), and to health care providers, suppliers, and practitioners for self-queries only. The cost of querying the HIPDB is \$4.25 per query.

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### *National Practitioner Data Bank (NPDB)*

The National Practitioner Data Bank (NPDB) contains reports of medical malpractice payments, adverse licensure actions, adverse clinical privilege actions and adverse professional society membership actions against physicians, dentists and, in some cases, other health care practitioners. NPDB data is available to hospitals, professional societies, state licensing boards, and health care practitioners for self-queries only. State Medicaid agencies do not have access to this database. A query to the NPDB might be included as part of the background check for a physician or other health care practitioner with direct patient access employed by a hospital that provides long-term care services (i.e., long-term care hospital or swing-bed hospital), but would not be necessary for other employee categories (e.g., nurses). The NPDB is linked to the HIPDB and one query request allows access to both databases.

C6. Are we required to submit fingerprints of all prospective newly hired caregivers to the FBI, even if disqualifying information is found during the Caregiver name-based background check?

No. Section 307(b)(2)(B)(1) of the MMA, Elimination of Unnecessary Checks, stipulates that participating states must establish a procedure that permits a long-term care facility or provider to terminate the background check at any stage at which disqualifying information regarding a prospective newly hired caregiver is obtained (e.g., nurse aide registries, OIG Exclusions List, other databases, state criminal history record, FBI IAFIS record).

Therefore, it is not necessary to submit all fingerprints to the FBI, if disqualifying information is found earlier in the background check process.

C7. What is the expected response time for fingerprint submissions to the FBI?

If fingerprints are submitted electronically (via live-scan or card-scan technology), the expected response time for ten-print fingerprint submissions is within 24 hours for civil purposes.

C8. Our agency has very strict rules about who we will hire. We do not hire anyone with any criminal history. Do we have to change our hiring process to apply only the rules set by the pilot?

No. The state Offenses list and federal list of barring crimes is meant to be a minimum standard. Providers may apply more stringent hiring rules as long as those rules comply with Wisconsin employment law.

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C9. What if a potential employee refuses to get fingerprinted?	<p>Individuals who refuse to complete any part of the background check process are ineligible for hired as a caregiver.</p> <p>50.065(6)(bm) states “The department or entity may require the person to be fingerprinted...The department of justice may provide for the submission of the fingerprint cards to the federal bureau of investigation for the purposes of verifying the identity of the person fingerprinted and obtaining records of his or her criminal arrests and convictions.”</p>
C10. My agency does background checks up front before we even meet the candidate. Do I have to send all my applicants to get fingerprinted?	<p>No. The pilot does not require all applications to go through a fingerprint-based background check. Only newly hired caregiver employees are required to get a fingerprint-based background check. For most employers that will mean sending only the top candidate to get fingerprinted.</p>
C11. Some caregivers may be intimidated by the fingerprint process and refuse to participate. How do you suggest we stem employee panic related to this pilot?	<p>The pilot only covers newly hired caregivers. Existing employees will not be impacted.</p> <p>DHFS is creating a fact sheet for applicants affected by the pilot that answers some basic questions.</p> <p>Individuals who refuse to participate in any part of the background check process are ineligible for hire as caregivers.</p>
C12. Some caregivers may have concerns with privacy and confidentiality.	<p>Neither the FBI, nor the WI Department of Justice, nor the WI Department of Health and Family Services will retain copies of the individuals' fingerprints or their background check results. The provider does not have access to the fingerprints and is required to keep all background check information in a confidential file.</p> <p>See <a href="#">Section D</a>.</p>
C13. If there is a stigmatizing / shrinking effect on the workforce (especially the minority populations), how will this be addressed?	<p>This pilot was created by CMS to test whether requiring a fingerprint-based federal background check would result in a reduction of the available workforce and/or a stigmatizing effect for caregiver positions. Impact on workforce will be one of the items studied in the evaluation.</p> <p>The pilot requirements are only in effect for 19-21 months (depending on the county).</p>
C14. What happens after the pilot?	<p>The pilot ends on September 30, 2007. On October 1, 2007, providers will go back to their existing background check process.</p>

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C15. How will agencies that serve both Racine and Kenosha provide equal opportunity for employees, when one county is a pilot county and the other a control county?

All applicants have an equal opportunity to apply in both counties. The process for applying, however, will be different.

Providers with facilities in both counties will need to conduct the fingerprint based background check for all new employees who are slated to work in facilities located in Kenosha County. New employees slated to work in Racine County facilities will need to go through the current background check process.

Employees hired to work in both counties need to complete the fingerprint-based federal and state background check.

Employees who are transferred from a facility in Racine to a facility in Kenosha with the same employer are not considered new hires and therefore will not be required to receive a fingerprint-based federal and state background check prior to the transfer.

C16. Is there any protection for employers who making hiring decisions based on background checks.

As a requirement of the pilot, DHFS requested that an immunity clause be added to 50.065.

The following was added to s. 50.065 **(new language in bold)**

- **50.065(2)br: Except as provided in subd. 2, an entity that receives information regarding the arrest or conviction of a caregiver from the federal bureau of investigation in connection with a criminal history search under this section may use the information only to determine whether the caregiver's arrest or conviction record disqualifies him or her from serving as a caregiver. An entity is immune from civil liability to a caregiver for using arrest or conviction information provided by the federal bureau of investigation to make an employment determination regarding the caregiver.**

**2. Subdivision 1. does not apply to use by an entity of arrest or conviction information that the entity requests from the federal bureau of investigation after September 30, 2007.**

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- C17. Does the Wisconsin Caregiver Misconduct Registry on the Promissor website have information from other states? We thought that we only needed to check this website to get misconduct information from all the states.
- There is no national caregiver registry. When a caregiver applicant discloses that they lived in another state in the past three years, the provider must search that state's registry. The contact list for other state registries can be found at: <http://dhfs.wisconsin.gov/caregiver/NATD/NADotherStates.htm>
- The Wisconsin Caregiver Registry does have limited information on Wisconsin caregivers who have misconduct cases that occurred in other states. Searching the Wisconsin Caregiver Registry does not fulfill the requirement to check other states registries when a caregiver discloses living in another state in the past three years.
- C18. How does a caregiver get posted on the Office of Inspector General (OIG) exclusion list?
- The Health Insurance Portability and Accountability Act (HIPAA) of 1996 expanded and revised the OIG's administrative sanction authorities by, among other things, establishing certain mandatory and discretionary exclusions for various types of misconduct.
- The federal government will not reimburse services (1) furnished by an excluded individual or entity, or (2) directed or prescribed by an excluded physician. Exclusions include:
- **Conviction of Program-Related Crimes:** Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.
  - **Conviction Relating to Patient Abuse:** Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service. (\*Also contained in WI Offenses Affecting Caregiver Eligibility List.)
  - **Felony Conviction Relating to Health Care Fraud:** Any individual or entity that has been convicted for an offense which occurred after April 2003, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.
  - **Felony Conviction Relating to Controlled Substance:** Any individual or entity that has been convicted for an offense which occurred after April 2003, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

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- **Finding of Patient or Resident Abuse:** Any substantiated finding by a State agency under section 1819(g)(1)(C) or 1919(g)(1)(C) of the Social Security Act (42 U.S.C. 1395i-3(g)(1)(C), 1396r(g)(1)(C)) or a Federal agency that a direct patient access employee has committed (A) an act of patient or resident abuse or neglect or a misappropriation of patient or resident property. (\*Also contained in WI Offenses Affecting Caregiver Eligibility List.)

To be in compliance with HIPAA, OIG urges providers to check the OIG List of Excluded Individuals/Entities on the OIG website <http://www.oig.hhs.gov/fraud/exclusions.html> prior to hiring or contracting with individuals or entities.

To be in compliance with the pilot, affected providers are required to check the OIG List of Excluded Individuals/Entities prior to hire. Providers are also required to look for these offenses when reviewing criminal history information obtained through the name and the fingerprint-based searches.

C19. When are caregivers with a finding taken off the misconduct registry? What if they have gone through the rehabilitation review process?

Individuals with a finding are never removed from the Wisconsin Caregiver Misconduct Registry. If the individual completes a Rehabilitation Review process and is approved to work, that information will be added to the Wisconsin Caregiver Misconduct Registry.

C20. Does the caregiver have to disclose that they've had a finding in the past 4 years?

Yes. According to the Wisconsin Caregiver Program Manual, Section 2.5.0, "An entity must include in its personnel or operational policies a provision requiring employees, contractors or nonclient residents to notify the entity as soon as possible, but no later than the person's next working day when they have been convicted of any crime or have been or are being investigated by any governmental agency for any act or offense."

C21. What happens if a facility does not comply with the requirements of the pilot? Can we be cited?

Yes, entities that do not comply with the pilot requirements may be cited.

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- C22. If an individual said they lived in Illinois within the past three years, do we have to run a criminal check in Illinois or does the FBI check cover that requirement?
- The FBI fingerprint-based criminal background check will provide criminal arrest and conviction information from the nationwide database. No additional criminal background checks will be required if an applicant discloses living in another state in the previous three years.
- C23. Are providers required to print anything off or prove that we checked the OIG list? Do we need any type of documentation in the file (criminal or personnel file) stating that we completed the free registries check?
- Providers are required to document that all the steps in the process were completed. There is no set requirement on the type of documentation that must be used for the free registries check. Some providers may choose to do a screen print for the free registry checks. Other providers may choose to use the Caregiver Pilot Worksheet. Still others may choose to write a note to the file that the free registries were checked. All of these means of documentation are acceptable.
- C24. For the states that do not have a website listed for the Nurse Aide Registry, do we need to place a phone call?
- Yes.
- C25. Do we have to get permission to fingerprint a minor who applies for a job during the pilot period?
- The Office of Legal Counsel at DHFS is not aware of any requirements, laws or restrictions on taking a juvenile's fingerprints.
- C26. Some minors may not have a driver's license or a state identification card. Will you accept a school identification card as valid government-issued photo identification at the fingerprint appointment?
- Yes, minors will be able to use a current school identification card as proof of identification at the fingerprint appointment.



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C27. What if a caregiver's prints are rejected by the FBI as unreadable?

On a very rare occasion, an individual will have prints that are unreadable. If the FBI or the Wisconsin DOJ is unable to read an individual's prints, the provider will receive a message on their DOJ account that the prints were unreadable and that the individual should be sent again to be fingerprinted. An alert will also be sent to Rebecca Swartz the pilot Project Coordinator.

If the prints were rejected at the DOJ level and are unreadable on the second round of fingerprinting, the Caregiver Background Check name search results will be used in place of the state fingerprint results.

If the prints were rejected at the FBI level and are unreadable on the second round of fingerprinting, the provider will work with Rebecca Swartz and the DOJ to submit a name search request to the FBI. The FBI name search results will be used in place of the federal fingerprint results.

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